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In The

Supreme Court of The United States

GATES KIDD, et Al.,
Appellants,

vs.

GEORGE F. McCANLESS,
Appellee.

No. 36651

In the Supreme Court
of the
State of Tennessee

JURISDICTIONAL STATEMENT

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May It Please The Court:

Reference to Report of Opinion in Court Below

Unofficial report of the opinion delivered by the Supreme Court of Tennessee in the above styled and numbered case is published in 292 S. W. 2d. at page 40; Advance Sheet No. 1, 292 S. W. 2d., dated August 21, 1956. Said opinion and the opinion of the Supreme Court of Tennessee, denying appellants' petition to rehear, is appended hereto.

Grounds on Which Jurisdiction is Invoked

I.

The proceeding is an appeal where is drawn in question the validity of a statute of the State of Tennessee on the ground that it is repugnant to the Constitution of the United States, the decision of the Supreme Court of Tennessee, from which appeal is had, being in favor of the validity of the Tennessee statute.

II.

The decree sought to be reviewed was made and entered by the Supreme Court of Tennessee on April 5, 1956. Order denying appellants' petition for a rehearing was made and entered on June 8, 1956. Notice of appeal was filed in the Supreme Court of Tennessee on July 19, 1956.

III.

Section 1257, Title 28, U.S.C., subsection (2) permits review by the Supreme Court of the United States of a judgment or decree of the Supreme Court of Tennessee by appeal, in a case in which the validity of a state statute is questioned for its repugnancy to the Constitution of the United States and decision in favor of the validity of the questioned statute is rendered by the Supreme Court of Tennessee.

IV.

The following cases are believed to sustain the jurisdiction of this Honorable Court:

1. *Snowden* v. *Hughes*, 321 U.S. 1
2. *McPherson* v. *Blacker*, 146 U.S. 1
3. *Nixon* v. *Herndon*, 273 U.S. 536
4. *Nixon* v. *Condra*, 286 U.S. 73
5. *Thomas* v. *Reid*, 142 Oklahoma 38, 285 Pacific 92
6. *Cook* v. *State*, 90 Tenn. 407, 116 S.W. 471
7. *Maynard* v. *Board of Canvassers*, 84 Michigan 228, 47 N.W. 756.
8. *Dyer* v. *Kanzuhisa Abe*, 138 F. Supp. 220.

V.

The validity of certain statutes of Tennessee is involved. Said statutes, sections 3-101 - 3-107, inclusive, Tennessee Code Annotated, are published in the Official Edition of the Tennessee Code Annotated in Volume 2, pages 186, 187 and 188 of said Code. Together, they provide for apportionment of seats in the General Assembly of Tennessee. Being lengthy, the texts of said statutes are set forth in the appendix hereto.

Questions Presented by the Appeal

The Constitution of Tennessee requires the making of an enumeration of qualified voters and an apportionment of representatives and senators in the General Assembly every ten years. The representatives and senators of the General Assembly are to be "apportioned among the several counties or districts, according to the number of qualified voters in each." Acts of apportionment were enacted in 1871, 1881, 1891 and in 1901. No enumeration of voters was made in preparation for the passage of the apportionment act of 1901. According to the best evidence available, the United States census taken in 1900, pursuant to the act of Congress of March 3, 1899, 30 Stat. 1014, section 201, that apportionment provided by the act of 1901 did not fairly and equally apportion representatives and senators among the several counties and districts, discriminating against the counties in which appellants reside and favoring other counties with representation in the General Assembly to which their population would not entitle them. In the 55 years passing since enactment of said act of 1901, the various General Assemblies of the State of Tennessee have failed and refused to make other and further enumerations and to apportion the representatives and senators in the General Assembly among the counties and districts according to the qualified voters in each, defeating every act looking to reapportionment of the Legislature.

The apportionment act of 1901 continues to be enforced against appellants and other citizens of Tennessee.

When enacted, said apportionment act of 1901 required that a majority of the members of the Legislature be elected by less than a majority of the qualified voters of Tennessee. In the 55 years that have passed, continuing trends in population growth and shifts have so magnified the original inequality of representation that said apportionment act now requires that a majority of the members of the Legislature be elected by the majority had in elections at which less than one-third (1/3) of the qualified voters of Tennessee may vote. Does enforcement of said apportionment act deny appellants equal protection of the laws and Constitution of Tennessee, in violation of the Constitution of the United States, Amendment Fourteen, section 1?

Statement of the Case

Appellants sued the election commissioners conducting elections in appellants' counties of residence and, relief by way of declaratory judgment being asked, as required by the laws of Tennessee, made appellee, Attorney General of Tennessee, a party defendant, alleging the invalidity of Chapter 122 of the Acts of the General Assembly of 1901 (codified as Sections 3-101-3-107, Tennessee Code Annotated). In their original bill appellants pleaded the provisions of the Constitution of Tennessee requiring that elections be free and equal, that qualified voters of the state are entitled to vote for members of the General Assembly, and requiring enumeration of the qualified voters every ten years and an apportionment of the number of representatives and senators among the several counties or districts of Tennessee according to the number of qualified voters in each. Appellants pleaded the terms and

provisions of Chapter 122 of the Acts of the General Assembly of 1901, apportioning the number of representatives and senators among the counties and districts, and the invalidity of said act of apportionment for lack of an enumeration of qualified voters and for apportionment of representatives and senators on some basis other than according to the qualified voters residing in the several counties and districts. In their original bill and the exhibits thereto, appellants alleged and demonstrated the inequality of representation provided in said act when originally enacted and as presently applied to the counties and districts of Tennessee. As shown in appellants' bill and exhibits, said act of apportionment did not admit of election of a majority of the members of the General Assembly by a majority of the qualified voters of Tennessee and, instead, required election of a majority of the members of the General Assembly by a minority of the qualified voters of Tennessee. Appellants' bill alleged the debasement of appellants' vote by virtue of the relative overpopulation of their respective districts and alleged the senatorial districts as fixed by said act of 1901 to have grossly unequal voting populations, said districts varying in population between 131,971 in the Eighth Senatorial District and 25,190 in the Thirteenth Senatorial District, as shown by the United States census. Appellants alleged and their exhibits reflected the additional representation in the General Assembly of Tennessee to which their voting population would entitle them, and they pleaded the invalidity of said act of apportionment for its violation of the terms and provisions of the Constitution of Tennessee.

Appellants, in section I of their original bill, alleged "that they are now denied the right to equal suffrage in free and equal elections, which right is granted them by the Constitution of the State of Tennessee, and the equal protection of the laws, as guaranteed by both the Constitution of the State of Tennessee and by the Fourteenth Amendment to the Constitution of the United States." In section VII, subsection 5, of their original bill appellants alleged the apportionment act of 1901 to be unconstitutional because

> "5. These complainants are further denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes."

Some defendants answered, admitting appellants' right to relief; appellee demurred to the bill. From a decree overruling the demurrer and declaring the act attacked to be unconstitutional and no longer in force and effect by reason of the passage of time, appellee appealed to the Supreme Court of Tennessee.

In brief and argument before the Supreme Court of Tennessee appellants urged the unconstitutionality of said Chapter 122 of the Acts of 1901, General Assembly of Tennessee, for its violation of the provisions of the Constitution of Tennessee and for its denial to appellants of equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

In setting forth the insistences made by appellants, the Supreme Court of Tennessee summarized as follows:

> " . . . By their bill they prayed, in addition to process and general relief, a declaratory judgment of the court declaring the Apportionment Act of 1901, as amended, to be unconstitutional for the following reasons: (1) no census of qualified voters was made as required by Section 4 of Article II of the Constitution; (2) the Act was unconstitutional and discriminatory when enacted; (3) the Senate Joint Resolution adopted by the Legislature in 1901 was not followed when said Act was enacted by the General Assembly; (4) the Apportionment Act of 1901 became unconstitutional and obsolete in 1911 because a new enumeration and apportionment was not made in that year; and (5) because the three counties where the complainants reside and vote are now entitled to greater representation in the Legislature than is afforded them by said Act. The bill alleges and charges because of this last assigned reason the respective complainants who reside and vote in their respective counties are denied the right to equal franchise and suffrage. The bill further alleges in support of these charges that a minority of approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives. The bill alleges also that the defendants will continue to conduct elec-

tions for members of the General Assembly according to said Act unless they are restrained by the court. * * * "

Ruling on the questions presented, the Supreme Court of Tennessee admitted the invalidity of but refused to enter a decree holding said Act unconstitutional, saying:

" . . . Under the allegations of the bill this Act was invalid at the time it was enacted, but the bill fails to allege the existence of a prior valid apportionment act to fall back upon. In that situation the authorities are practically unanimous in holding that a court will not declare such a statute invalid. In Fesler v. Brayton, 145 Ind. 71, 44 N.E. 37, 32 L.R.A. 578, the Court said that the effect of striking down an apportionment statute under those circumstances would be to destroy the State Government. See also State ex rel. Winnie v. Stoddard, 25 Nev. 452, 62 P. 237, 51 L.R.A. 229. In State ex rel. Sullivan v. Schnitger, 16 Wyo. 479, 95 P. 698, at page 708, a number of cases are cited for the proposition that the court will not declare an apportionment act invalid unless there is a prior valid act on which they may fall back.

"We are therefore of the opinion that the Chancellor was in error in overruling the tenth ground of the Attorney General's demurrer. His decree is accordingly reversed, and the bill is dismissed at the cost of complainants."

In overruling and reversing the Chancellor and holding that the act complained of is immune from attack since practical difficulties might be encountered if they should hold other than that the act is valid, the Supreme Court of Tennessee made a ruling of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

The Federal Question is Substantial

The discrimination between qualified voters of Tennessee made by said act of apportionment is without parallel in the United States. In the 38 states in which state supreme courts have been called upon to examine acts of apportionment, variations in voting populations of counties and districts were often but ten to twenty percent. Under said act of 1901 and its amendments, the qualified voter of Moore County, Tennessee, has 18 times as much representation in the House of Representatives of the Tennessee Legislature as does the qualified voter of Davidson County, Tennessee. The Constitution of the United States guarantees a republican form of government to the people of every state and the Constitution of Tennessee would not have been approved by the Congress of the United States if it had undertaken to negate the principle of majority rule, the foundation of republican systems of government.

Appellants' bill abundantly shows the invidious and purposeful discrimination prevailing in Tennessee; equal protection of the laws involves a reasonably equal share in the process of making laws. The ruling of the Supreme Court of Tennessee is that equal protection of the law may be denied if the statute denying

equal protection of the laws would affect the law making body. Thus, that Court's ruling provides a vehicle whereby the Constitutional guarantee of a republican system of government may be circumvented and whereby an invidious and purposeful discrimition may be had between citizens of the same state.

> " . . . Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that discrimination relates to political rights," *Snowden* v. *Hughes*, 321 U.S. 1, 11.

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral arguments for their resolution, because:

1. A decree of unconstitutionality is not to be entered or withheld according to the balance of conveniences. The Constitution is to be itself applied equally, without fear or favor, according to the guarantees contained in it and not according to whether practical difficulties may attend its enforcement.

2. The Fourteenth Amendment to the Constitution of the United States and the equal protection clause contained in it addresses itself to every branch of state government, legislative, executive and judicial. The ruling of the Supreme Court of Tennessee specifies invidious and purposeful discrimination, but reverses and overrules a Chancellor granting relief and refuses entry of a decree of unconstitutionality, inasmuch as the legislative branch of the government of Tennessee is involved.

3. The effect of the ruling and holding of the Supreme Court of Tennessee is that the Constitutions of Tennessee and of the United States do not secure the purity of elections or the principle of majority rule to the qualified voters of a state. The ruling permits unequal elections and upholds a statute requiring rule of a minority.

4. The Act attacked constitutes a present invasion of rights guaranteed appellants by the Constitution of Tennessee and of the United States. Neither Constitution would require of appellants a showing that a prior act of apportionment [the newest is 66 years old] would serve to give to appellants a reasonably equal share in the law making process and thus equal protection of the laws, now and in this time. To require this showing would be to require appellants to condone and compliment the purposeful, biased inaction through which minority rule is perpetuated in Tennessee.

> "The result by non-action has been a purposeful and systematic plan to discriminate against a geographic class of persons. It has been achieved as though a positive statute had been passed to accomplish the same purpose.
>
> "Biased inaction has had the same result as biased action. It is a denial of equal protection of the law."
>
> *Dyer* v. *Kanzuhisa Abe*, D. C. Hawaii, 138 F. Supp. 220.

Conclusion

For the foregoing matters, it is believed that this Honorable Court may take jurisdiction of appellants' cause and correct the errors in same.

Respectfully submitted,

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